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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 27.

DAVID J. VANN and ROBERT S. VANCE,
Appellants,

vs.

BETTYE FRINK, Secretary of State of the State of Alabama, et al.,
Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

BRIEF OF APPELLANTS.

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Appeal from the United States District Court for the Middle District of Alabama.

BRIEF OF APPELLANTS.

OPINIONS BELOW.

This is a cross-appeal by intervening plaintiffs, David J. Vann and Robert S. Vance, from the decree of the United States District Court for the Middle District of Alabama, Northern Division. The decree was entered by the court as a statutory three-judge court on July 25, 1962 (R. 173), pursuant to the court's opinion filed on July 21, 1962 (R. 187). The opinion of the District Court is reported at 208 F. Supp. 431. A preliminary opinion entered on April 14, 1962 (R. 62) is reported at 205 F. Supp. 245.

GROUNDS OF JURISDICTION.

This appeal concerns the failure of the court below to remove the invidious discrimination in the apportionment of the upper house of the Legislature of Alabama. Appellants first seek relief with respect to the Alabama Senate comparable to the substantial relief granted by the District Court with respect to the Alabama House of Representatives. In addition, appellants seek declaratory relief as to the standards to be applied by the Legislature of Alabama in any permanent reapportionment act.

These appellants were intervening plaintiffs in the court below. All parties plaintiff are citizens, taxpayers and voters of the State of Alabama and residents of three of its most populous counties. Defendants are the public and political party officials who, under Alabama law, control and operate the election processes by which members of the State Legislature are selected.

The amended complaint in the District Court sought a declaratory judgment pursuant to Title 28, U. S. C., §§ 2201 and 2202, as well as injunctive relief. Jurisdiction rests on those sections and on Title 42, U. S. C., §§ 1983 and 1988, and Title 28, U. S. C., § 1343 (3). The case was heard by a panel of three judges convened under Title 28, U. S. C., §§ 2281 and 2284. Jurisdiction of this appeal is conferred on this court by Title 28, U. S. C., § 1253.

Following the opinion of the District Court on July 21, 1962, these appellants filed a motion for rehearing and modification of proposed decree on July 25, 1962, by which the court's failure to grant substantial relief with respect to the Alabama Senate as originally prayed by the plaintiffs was again presented to the lower court (R. 168). That motion was denied on July 25, 1962 (R. 172). No-

tice of appeal was filed by these appellants on August 23, 1962 (R. 201). Probable jurisdiction was noted by this court on June 10, 1963.

APPLICABLE CONSTITUTIONAL PROVISIONS.

The following provisions of Section 1 of Amendment XIV to the Constitution of the United States is involved:

> "* * *. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following provisions from the Constitution of Alabama of 1901, as found in Volume 1 of the Code of Alabama of 1940, are involved in this appeal:

Article IX, § 198:

> "The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken."

Article IX, § 199:

> "It shall be the duty of the legislature at its first session after the taking of the decennial census of

the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that each county shall be entitled to at least one representative."

Article IX, § 200:

"It shall be the duty of the legislature at its first session after taking the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other."

Article XVIII, § 284:

"• • •. Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

QUESTIONS PRESENTED.

I.

Were appellants entitled to have the decree of the court below, insofar as it provisionally reapportioned the Senate of the State of Alabama, substantially comply with the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

II.

Were appellants entitled to a declaration from the court below that, under §§ 200 and 284 of the Constitution of Alabama of 1901 and the Fourteenth Amendment of the Constitution of the United States, the Senate of the State of Alabama must be apportioned so that Senate districts are "as nearly equal to each other in the number of inhabitants as may be"?

III.

In this proceeding, should the provisions of the Constitution of Alabama of 1901, and particularly of §§ 198, 199, 200 and 284 thereof, be applied so as to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in the light of the distribution of population within the State of Alabama according to the last federal census?

IV.

Is the Equal Protection Clause of the Federal Constitution violated by apportionment of seats in the Senate of Alabama on other than a substantially proportional populative basis?

STATEMENT OF THE CASE.

This suit was commenced prior to this Court's decision in *Baker v. Carr*, 369 U. S. 186, and was continued by the District Court pending the outcome of that case. The amended complaints of the plaintiffs and intervening plaintiffs, charged, *inter alia*, that the Alabama legislature's failure to reapportion itself throughout the entire sixty-one year period since the adoption of the 1901 Constitution had worked to deny them the equal protection of the law required by the Fourteenth Amendment. The complaints sought a declaratory judgment and such injunctive relief as would effect the apportionment of the legislature in conformity with the equal protection requirements. On April 14, 1962, the District Court rendered an opinion on an application for interlocutory injunction in which it noted that plaintiffs had standing to sue, and that they had a justiciable cause of action with respect to which effective relief should be granted prior to the November, 1962 general elections (R. 62). The hearing was continued until July 16, 1962, to give the Alabama Legislature ample opportunity to reapportion itself and thereby avoid the need for further court action.

An extraordinary session of the State Legislature was called and on July 12 and 13, 1962, two reapportionment plans were adopted. Neither plan was to take effect until 1966. One was a proposed constitutional amendment (known as the "67-Senator Amendment") (R. 157) and the other, a reapportionment act (known as the "Crawford-Webb Act") (R. 160) to be effective in the event of the failure of the amendment to win popular ratification.

Citizens petitioned the Legislature for a constitutional bill. Appellants petitioned the Governor seeking from him an Executive Amendment to the Crawford-Webb Act. All

such efforts failed. Neither plan purported to base representation in both houses on a population basis.

The proposed 67-Senator Amendment would have completely removed population as a factor in the Senate and awarded one senator to each county regardless of population. In the 106-member lower house,[1] each county was also given one member regardless of population as provided for by § 198 of the Alabama Constitution; the 39 remaining seats were assigned on the basis of population under the method of equal proportions.

The Crawford-Webb Act was a minimum-change measure which merely transferred a few seats in the lower house from the most over-populated to the most under-populated counties and which redrew new senate districts around the nominees of the May, 1962 Democratic Primary so as to retain the seats of 34 of the 35 nominees. This act did not purport to meet any population standard in either house. Its principal sponsor, Senator Webb, represented in argument before the District Court that it was the best measure which could possibly be enacted by the Alabama Legislature as then apportioned.

Apparently contemplating that neither measure would pass the constitutional test in the proceedings below, already set for hearing, the Legislature also adopted an act providing for special primary elections in the event of court-ordered reapportionment (House Bill 130, Special Session 1962, approved July 23, 1962; Acts of Alabama, 1962 Special Session, p. 226).

Under the Alabama Constitution, the duty of reapportionment following each decennial census is placed on the Legislature itself (§§ 199 and 200). Alabama courts have

[1] An additional county, Houston, had been created in 1903. By operation of § 198 of the Alabama Constitution of 1901 the total membership of the Alabama House of Representatives was thereby increased to 106.

held that other branches of Government are powerless to compel reapportionment as required by the State Constitution in the event of the Legislature's failure to act (*Waid v. Pool*, 225 Ala. 441, 51 So. 2d 869). The Constitution contains no provisions for public initiative with respect either to reapportionment or Constitutional amendment.

Since the adoption of the 1901 Constitution and the apportionment of the legislature as therein provided, there has been a marked population shift within the state (see: Appendices D and E to the opinion of the District Court, R. 163-166). The result is an exaggerated concentration of power in the citizens of some small counties and corresponding under-representation of the citizens of the larger counties. The 1960 census shows that prior to the decree below, control of the Alabama House of Representatives rested with a minimum of 25.7% of the people of the State and that the Senate was controlled by 25.1% (**Compendium on Legislative Reapportionment**, Second Edition, National Municipal League, page iii). Jefferson County, the most populous county in the state, has almost 20% of the state's population but had only 6.6% of the representation in the lower house of the Legislature and only 2.9% of the representation of the Senate.

At its hearing on July 16, 1962, immediately after the close of the Extraordinary Session of the Alabama Legislature, the lower court had before it a motion for interlocutory injunction and a motion for summary judgment (R. 63, 82). All sworn pleadings and affidavits of plaintiffs and interveners, as well as oral testimony and exhibits, were received into evidence (R. 131-135). The issues submitted included the merits of the amended complaints and the validity of the two measures adopted less than a week previously by the Alabama Legislature (R. 144).

In its opinion of July 21, 1962, the District Court noted that all parties had generally conceded that the existing apportionment of both houses of the Alabama Legislature constituted invidious discrimination in violation of the Fourteenth Amendment. It so held. It likewise held that the Senate plan of the proposed 67-Senator Amendment and the plan for both upper and lower houses of the Legislature as contained in the Crawford-Webb Act were unconstitutionally discriminatory, arbitrary and irrational (R. 151, 154).

Having so found, the court applied the remedy of provisional reapportionment, which had been prayed by these appellants (R. 59, 71). However, it rejected all suggested plans for substantial Senate reapportionment (R. 74, 128) and adopted as its own plan a combination of the equal proportions lower house apportionment, sponsored by the plaintiffs and incorporated in the 67-Senator Amendment, and the Senate plan as contained in the Crawford-Webb Act, which the court's opinion had just declared to be invidiously discriminatory. In practical effect, the lower court's order resulted in the shift of only one Senate seat from one over-represented district, consisting of Lowndes County, to another newly-created and under-populated district, consisting of Blount and St. Clair Counties.[2]

The District Court held that this plan, which was ordered into effect in the November, 1962 general election, would not suffice as permanent reapportionment, but expressed a hope that it might prove sufficient to release

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[2] The changes under the court's provisional plan might, at first glance, appear more extensive. But the Crawford-Webb senatorial districts had been carefully drawn around the nominees of the 1962 Democratic primary. Thirty-three Crawford-Webb districts contained only one senate nominee. Only one district contained no senate nominee with a selection necessary under the companion Special Primary Act. One district contained two senate nominees, between whom the Special Primary Act provided for a run-off with new candidates prohibited.

the existing stranglehold then held in the Legislature by a small-county minority. The court refrained from spelling out specific Constitutional standards to be applied under permanent reapportionment. It retained jurisdiction until the legislature, as provisionally reapportioned, shall have had an opportunity to enact its own permanent reapportionment plan.

The relief in the House of Representatives was substantial. Previously, representatives of counties having 25.7% of the population could control the lower house. Under the method of equal proportions, while minority control still obtains because of the rule granting each county one representative regardless of population, control requires agreement of representatives of at least 43.8% of the people.[3] But the Senate, which under the Alabama Constitution is required to be apportioned on a pure population basis, control by senators representing 25.1% of Alabama's people is replaced by control by representatives of a mere 27.6% of the people. The court expressly refused to provide majority control in even one house of the Legislature under its provisional reapportionment order. It permitted an apportionment plan for the Senate which contains ratios of discrimination as large as 20-to-1 against citizens of Jefferson County, 10-to-1 against citizens of Mobile County, 5-to-1 against citizens of Montgomery County, ratios of over 3-to-1 against residents of 11

[3] Even this fairest plan for House apportionment, with retention of the one-representative-per-county rule, contains discrimination ratios (when comparison is made with the most over-represented county) of 5-to-1 against the people of Houston, Lee, Baldwin and Marshall Counties; 4-to-1 against residents of Jefferson, Mobile, Montgomery and Russell Counties; 3-to-1 against Calhoun, Dallas, Etowah, Tuscaloosa, Lauderdale, Morgan, Talladega, Walker, Chambers, Coffee, Covington, Dale, Elmore, Escambia, Jackson, Limestone, Macon, Marengo, Shelby and Tallapoosa; and ratios of 2-to-1 against fourteen other counties. In other words, even under the method of equal proportions, the residents of 45 of Alabama's 67 counties are discriminated against by a ratio of more than 2-to-1 in the House of Representatives.

counties, and over 2-to-1 against citizens of 21 other counties.

To date, the hope of the District Court that it might conceivably by its "slight improvement" break the stranglehold of the Legislature has proved to be an utterly futile dream. At the time of this writing, the Legislature of Alabama is in the closing days of its regular biannual session and there is a virtual certainty that no reapportionment measure will even come up for consideration in both houses. Thus far, no reapportionment measure has passed either house of the legislature and the only legislative accomplishment touching on the subject is found in the lower house's approval of a resolution seeking a constitutional amendment to bar future federal court "interference" in reapportionment cases[4] and that house's approval of a proposed amendment[5] to the Constitution of Alabama which will, if adopted, delete the last sentence of § 284 requiring that representation be on the basis of population. The latter measure was sponsored by the speaker of the House and the House floor leader, the two principal leaders of the present Wallace administration. The floor leader, Hon. Rankin Fite, who is also one of the attorneys for Appellees, Reynolds et al., explained that the measure "is pretty vital to us. If we don't strike it out, the Federal Courts will reapportion the Senate" (Birmingham Post-Herald, Saturday, July 31, 1963, page 1).

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[4] H. J. R. 62, sponsored by several administration leaders, memorializes Congress to call a convention for the purpose of proposing a Constitutional amendment which provides in part:

"Section 1. No provision of this Constitution, or any amendment thereto, shall restrict or limit any state in the apportionment of representation in its legislature.

"Section 2. The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy, relating to apportionment of representation in a state legislature."

[5] H. J. R. 93.

SUMMARY OF THE ARGUMENT.

The court below assumed jurisdiction of this case on the ground that existing legislative apportionment in Alabama discriminated so egregiously as to offend the Federal Constitution. In fashioning its provisional reapportionment remedy, the court below should have applied the State Constitution insofar as its provisions did not violate the Federal Constitution.

The Alabama Constitution of 1901 provides a plan of legislative apportionment which, if applied, would comport to Fourteenth-Amendment requirements: the Senate is apportioned on a pure-population basis; the House of Representatives is apportioned with one representative for each county regardless of population and with additional members assigned to the larger counties on a population basis in such a manner, under present population distribution, as to avoid invidious discrimination.

With respect to the Alabama Senate, the court below adopted a provisional plan which affords no semblance of compliance with any Constitutional requirement. The plan perpetuated in office all save one of the senators nominated in May, 1962 under 1901 apportionment, which was declared in the same proceeding to result in invidious discrimination. The plan adopted was itself declared constitutionally offensive by the same court in the same decree. Constitutionally acceptable plans, equally feasible in their execution, were rejected by the court in favor of an apportionment which, by court decree, results in a gross denial of equal protection to United States citizens.

Appellants contend that the citizens of Alabama are entitled to equal representation in their State Senate. By this appeal, appellants seek such representation.

ARGUMENT.

I.

The District Court Declined to Relieve the People of Alabama From Minority Control of Their State Senate.

The simple proposition presented by this appeal is: were the people of Alabama entitled to relief in the court below which would effectively eliminate egregious malapportionment in the upper house of their State Legislature?

Appellants' rights under the Fourteenth Amendment had long been violated by the inaction of legislators. The seats in the Legislature were so rivited to their respective constituencies that true reapportionment by legislative action had become impossible. The plaintiffs sought relief in the federal court because the Alabama Supreme Court had held that state courts were powerless to afford relief, and because no means of popular initiative was available. The District Court recognized that, if properly applied, the Alabama Constitution of 1901 would afford the federally guaranteed equal protection. Full compliance with these Alabama standards was the objective of this litigation.

The District Court declined declaratory relief to establish definitive standards for Senate apportionment. Appellants contend that the lower court fell into fundamental error when it accepted, on even a provisional basis, the Senate apportionment as set out in the Crawford-Webb Act. The Court explained its action as follows:

> "The only alternatives, however, which have been suggested or which appear to be subject to approval

by the application of mathematical or judicial as distinguished from political standards, would result in very drastic reapportionment, and would probably place nine counties having over half the population of the State in control of the Senate" (R. 155).

In concluding that Senate apportionment based on the equal protection of equal representation was more "drastic" than the equal protection afforded by the Fourteenth Amendment, we respectfully suggest that the District Court seriously failed in its duty to the people of Alabama as United States citizens.

II.

The Alabama Constitution of 1901 Requires Senate Apportionment on a Strict Population Basis.

The court below recognized that having properly taken jurisdiction in this case under the federal constitution, it was required to give application not only to federal constitutional standards, but also to the admittedly valid standards of the Alabama Constitution. *Louisville & Nashville Railroad Co. v. Garrett*, 231 U. S. 298; *Wofford Oil Co. v. Smith*, 263 F. 396 (R. 146).

The Alabama Constitution of 1901 provides that "representation in the legislature shall be based upon population" and, with particular reference to Senate districts, provides that the same "shall be as nearly equal to each other in the number of inhabitants as may be." Such proportionate representation would require the division of each of the more populous counties into more than one Senate district. Such division of counties into Senate districts was challenged in the court below by reason of the last sentence of § 200, which provides: "No county shall be divided between two districts, and no district

shall be made up of two or more counties not contiguous to each other."

This prohibition against dividing a county is an anti-gerrymandering provision which has been brought down in one form or another through each of the successive Alabama Constitutions. In the original Constitution of 1819, the provision read in pertinent part:

> "When a senatorial district shall be composed of two or more counties, * * * no county shall be divided in forming a district."[6]

Successive Constitutional provisions provide no basis for any assumption that the provision as it now appears in the Constitution of 1901 was modified intentionally. Appellants contend that the present language should be construed as an obvious restatement of the Constitution of 1819.

Given effect as an anti-gerrymandering provision, i. e., a prohibition against the fragmentation of counties into pieces to be added to and dominated by other counties in the formation of Senate districts, the last sentence of § 200 is a rational and reasonable provision in harmony with the remaining provisions of the Constitution of 1901.[7]

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[6] As reprinted in the Code of 1852, the last half of this provision was preceded by a semi-colon. Examination of the original, enrolled and executed copy of the Constitution of 1819, now deposited in the archives of Alabama, shows, however, that this semi-colon is a typographical error and that the phrase was originally preceded by a comma, thereby eliminating any reasonable doubt that the first phrase of the section, "when a senatorial district shall be composed of two or more counties" modifies both primary clauses of the provision. This fact was made known to the court below in argument and stood without dispute.

[7] Before Alabama's admission to statehood and while it was still part of the Mississippi territory, it was made subject to that part of the requirements of the Northwest Ordinance adopted by

Distorted into a prohibition against the division of a single county "into" more than one senatorial district to provide for near-true population apportionment, the provision is in diametric conflict with the population-apportionment mandate of the remaining portions of § 200 and of the companion provision in § 284, which the court below found to be the controlling or dominant provision of the Alabama Constitution. Settled rules of construction require that, if possible, consistent meaning shall be given to every part of § 200. *Brooks v. Mobile*, 31 Ala. 227; *Ex parte Wilson*, 269 Ala. 263, 112 So. 2d 443. Moreover, if it can reasonably be done, a construction should be placed upon this provision which would avoid the necessity of this Court holding it to be unconstitutional under the "overriding requirement of equal protection of the laws provided by the Federal Constitution," as the court below recognized it would be required to do (R. 155).

III.

Acceptable Plans of Provisional Senate Apportionment Were Presented to the District Court.

As appellants urged in the court below, under the Alabama Constitution, there is one and only one correct ap-

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the United States in Congress assembled on July 13, 1787, 1 Stat. 51, which provided:

> "Article 2. The inhabitants of said territory shall always be entitled to the benefits * * * of a *proportionate representation of the people in the legislature*". (Emphasis added).

This policy was carried forward into the first Constitution of the State in 1819 where, in Article III, § 10, it was provided that Senate districts should be:

> "* * * as nearly, equal, in the number of white inhabitants as may be * * *."

Except for the deletion of the word "white", this requirement has been carried forward in substantially identical form through the Constitutions of 1865, 1868, 1875, and into the present Constitution of 1901, where it appears in § 200. By no constitutional provision have the people of Alabama ever divested themselves of their right to equal, proportionate representation.

portionment of an Alabama Senate of 35 senators so that all senatorial districts are "as nearly equal to each other in the number of inhabitants as may be."[8] This most nearly perfect apportionment (R. 128) was proposed to the District Court as one of two alternative provisional plans of reapportionment. Under this "most nearly perfect" plan the most under-represented county would be Madison County, with a 1960 census population of 117,348. The most over-represented county would be Montgomery County, with two senate districts, each containing about 84,605 inhabitants. Under the proposal made, 25 of the 35 proposed Senate districts would be within 5,000 of the theoretically perfect district of 93,335.

The appellants proposed as a second alternative a temporary plan of provisional Senate apportionment (R. 74). In its preliminary opinion of April 14, 1962, the District Court had indicated an intention to follow the suggestion of Mr. Justice Clark in his concurring opinion in *Baker v. Carr*, that judicial reapportionment should merely break the "stranglehold" held on a malapportioned legislature. The alternative proposal accordingly provided a minimum of change but still provided approximately equal representation. This plan was built around the then existing senatorial districts. It retained 17 of those districts, merged 18 of the districts to form 9 provisional districts, and assigned 9 new seats to counties then most egregiously under-represented. Although this method commended itself because of its ease of execution in the 1962 general election, it still resulted in reasonably fair apportionment with the most under-represented district having 122,368 inhabitants and the most over-represented district having 76,564 inhabitants. By this alternative plan, there-

[8] Under the Alabama Constitution of 1901, §§ 50, 197, the present Senate of 35 members is the maximum permissible size. Under these provisions the Legislature could, however, reduce the size of the Senate.

fore, it was then possible for the court, while still carrying out its expressed intention, to reduce the factor of discrimination from 40-to-1 to a point where the ratio was substantially less than 2-to-1.

IV.

The Provisional Senate Apportionment Adopted by the District Court Perpetuates Invidious Discrimination.

The court rejected both Senate proposals of the appellants in favor of the Crawford-Webb plan. As a practical matter this plan afforded the appellants none of the Senate relief requested. The discriminatory variations in the court's plan are quickly apparent (R. 129). Representatives of a majority of the people are not only powerless to achieve permanent legislative reapportionment, they do not even have enough votes in the Alabama Senate to prevent the further dilution of their legislative representation by the creation of additional counties (12) or to defeat constitutional amendments (15).

No logical basis exists for the allocation of Senate seats in the manner which was selected by the Crawford-Webb drafters. In toto, the plan can be characterized readily as a "crazy quilt without rational basis." A parade of statistical horribles could be computed by Appellants to describe this plan. The District Court itself analyzed the Crawford-Webb senate as follows:

> "* * * this piece of legislation keeps the control of the Alabama Senate in 27.6% of the people of the State of Alabama. This represents an improvement of only 2.6% over the present control of 25.1%. The vote of a citizen of the Bibb and Perry senatorial districts would be worth twenty times that of a citizen in the Jefferson senatorial district. The vote of a citizen in the 6 smallest senatorial districts would be

worth fifteen or more times that of a citizen in the Jefferson senatorial district. In 22 districts, a citizen would have eight or more times as much representation as a citizen residing in the Jefferson district. Other isolated variations are: Lauderdale (population 61,622) is given one-half a senator by being placed with Limestone (population 36,513), making a district of over 98,000 people. This is opposed to Pickens (population 21,882) and Lamar (population 14,271), having one-half a senator each, with a total population of 36,153. To aggravate this, Colbert (population 46,506), Franklin (population 21,988) and Marion (population 21,837), having a total population of over 90,000, are given one-third a senator, while Henry (population 15,286), Hale (population 19,537), Bibb (population 14,357), Perry (population 17,358), Bullock (population 13,462), Lowndes (population 15,417), Marengo (population 27,098) and Sumter (population 20,041), all in the Black Belt area, are each placed in two-county senatorial districts and thereby given one-half a senator" (R. 151-152).

Moreover, when the court called the Crawford-Webb senate a "slight improvement" it failed to recognize, as appellants pointed out in motion for rehearing (R. 168), that virtually all of its meager surface improvements were effectively circumvented by operation of the Special Primary Act. The net result was the transfer of only one Senate seat (see note 2, supra). And yet this plan was the very one which the court adopted as the only "relief" afforded to the people of Alabama in the apportionment of their Senate.

It is the conviction of these appellants that the sense of the Fourteenth Amendment was correctly stated by Mr. Justice Black in his dissenting opinion in *Colegrove v. Green*, 328 U. S. 549, when he said:

"* * * the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast."

The controlling thought on which this principle is based was well stated by the Kentucky Supreme Court over fifty years ago in *Ragland v. Anderson*, 125 Ky. 141, 100 S. W. 865:

"Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer County shall have seven times as much influence in the government of the state as a man in Ohio, Butler, or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation. It was this kind of oppression which inspired that great struggle for freedom which began on Lexington Green in 1775, and ended at Yorktown in 1781. Equality of representation is the basis of patriotism. No citizen will, or ought to, love the state which oppresses him; and that citizen is arbitrarily oppressed who is denied equality of representation with every other citizen of the commonwealth."

Even laying aside this 19th century concept of absolute equality, the court-ordered provisional plan of reapportionment fails by any reasonable Constitutional standard. In truth, the sole basis of the Crawford-Webb senate was maximum perpetuation of incumbents in office. The picture as a whole clearly reveals incommensurables of both

magnitude and frequency which, on their face, present invidious discrimination.

The devaluation of the vote of Jefferson County residents in the State Senate remains roughly comparable to that which existed in *Baker v. Carr*, 369 U. S. 186, prior to litigation. In neither of the other cases which have been before this Court, *W. M. C. A., Inc. et al. v. Simon*, 370 U. S. 190, and *Scholle v. Hare*, 369 U. S. 429, did the degree of discrimination prior to litigation even begin to approach this 20-to-1 ratio. It is, therefore, clear that if the District Court's plan of reapportionment had existed in Alabama prior to this time, judicial intervention to provide relief similar to that now prayed with respect to the Senate would have been necessary.

V.

The Lower Court's Decree Provides No Reasonable Hope for a Permanent Solution by Legislative Act.

The concept of a provisional remedy rests on the premise that it will make possible the formulation of a permanent solution affording every citizen the equal protection guaranteed by the Fourteenth Amendment. But the formulation of a permanent solution within the Alabama legislature requires concurrence of both houses. The practical political effect of the District Court's decision is, in this respect, nil. The appellants and all similarly-situated residents of Alabama are put adrift on the same turbulent seas where their Constitutional rights to equal and fair representation have been washed away for over 62 years. The decision of the District Court provides neither chart nor compass nor sail.

The hope that the Alabama Senate as now constituted will agree to a constitutional reapportionment plan and remove a substantial number of incumbents from office is

as futile now as it has been within the last six decades. In April of 1962 this opportunity was given by the District Court to the Alabama legislature. By the admission of its sponsor, the Crawford-Webb plan stands as the best possible solution that could be produced even in the face of certain federal court action. This plan, as adopted by the District Court, resulted in the transfer of only one Senate seat from one over-represented district to another newly-created and over-represented Senate district. It is contrary to reason to indulge in any wistful dream that the stranglehold has been broken.

The District Court's decree with respect to the Senate was not only sterile in its ineffectiveness, but it also included a built-in offense to the rights of the majority with respect to permanent reapportionment. Control over permanent reapportionment by the legislature is placed in the hands of representatives of a minority. The twenty percent of the citizens of Alabama who happen to reside in Jefferson County are entitled to a substantially equal voice and vote in the legislative formulation of permanent reapportionment—not the 2.9% voice which they retain under the decree of the District Court.

Appellants did not ask that the District Court resolve itself into a political forum. Rather, we undertook to show that compliance with the clear requirements of the Alabama Constitution would effect compliance with the Fourteenth Amendment.

Appellants recognize that federal courts will not assume jurisdiction because of mere violations of state statutory or constitutional requirements. Having assumed jurisdiction on the basis of a denial of equal protection of the law, however, the District Court should act within the framework of the Alabama Constitution, if in doing so it could meet Fourteenth Amendment standards. This the court refused to do.

Appellants had previously been deprived of their rights by arbitrary and capricious inaction of their legislature. They are now equally deprived of those rights by court decree.

VI.

An Effective and Workable Judicial Remedy Was and Is Available.

The final paragraph of the opinion of the Court in *Baker v. Carr* indicated confidence that the relief to be afforded appellants could be fashioned in the light of well-known principles of equity. The application of judicial orders to effect reapportionment is not novel.[9] The plan offered by these appellants for a provisional reapportionment effected by injunctive orders was a practical solution within the framework of recognized principles of equity. The proof of its feasibility lies in the manifest ease with which the reapportionment order was carried into effect in Alabama in the general election of 1962. Nor would any substantial problems have been presented if that order had complied with Constitutional standards as prayed.

Similarly, the fulfillment of appellants' remedy by this Court presents no substantial difficulty at this time. A declaration of appellants' right to proportional Senate representation, followed by appropriate injunctive orders abolishing certain of the present Senate districts and declaring vacancies in newly-created seats can be carried into effect under existing Alabama law. Special election machinery to fill these vacancies, with no material disrup-

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[9] Courts have had little difficulty in fashioning orders to provide reapportionment remedies. See, e. g., *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724; *Board of Supervisors v. Blacker*, 92 Mich. 638, 52 N. W. 951; *Giddings v. Sec. of State*, 92 Mich. 1, 52 N. W. 944; *Shaw v. Adkins*, 202 Ark. 856, 153 S. W. 2d 415; *Baird v. Board of Supervisors*, 138 N. Y. 95, 33 N. E. 827.

tion in the processes of State government, is already in existence. Alabama Constitution of 1901, Amendment 97; Code of Alabama of 1940, Title 17, §§ 215-221.

CONCLUSION.

In the dissenting opinion of Justice Black of the Michigan Supreme Court in that court's original consideration of the case of *Scholle v. Hare*, it was aptly stated (104 N. W. 2d, at 105):

> "It is a somber and frightening thing to take away from the people in a democracy their right to an equal vote. We rob them at one stroke of their sword and their shield. We render them powerless. We invite their exploitation. We insure the perpetuations in the body politic of the most malignant growth. We breed cynicism and contempt for the processes of government. The sorry catalog of abuses of minority rule, here shown in small part, amply demonstrate a government by only part of the people, is both pernicious and destructive. The yoke must be responsive to the need to those on whose neck it rests. Every recourse at our command should be devoted to the protection of the guaranteed right of the free and equal balance."

The District Court put into effect a plan of Senate apportionment in Alabama which it had no hesitancy in itself condemning as constitutionally invalid. "Pernicious and destructive" minority rule has now been imposed on the people of Alabama in the name of the United States Constitution by a United States District Court.

The court below adopted as a constitutionally satisfactory **permanent** plan of reapportionment, the allocation of lower house seats in accordance with the State Constitution—an allocation which assigns almost two-thirds of

such seats to arbitrary political units irrespective of population. Appellants submit that the lower house allocation exhausts such latitude as may exist for non-populative apportionment.

Under both the Fourteenth Amendment and the Constitution of Alabama, the appellants are entitled to an equal voice in their State Senate. Appellants submit that they are now entitled to the declaratory relief sought and to the further relief of injunctive orders from this Court, or from the District Court on remand, placing into immediate effect appellants' proposed plan of Senate apportionment (R. 128), which fully embodies such constitutional standards.

Respectfully submitted,

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